

TYSHON MALEKE HARMON,)	No. C 10-4053 LHK (PR)
)	
Plaintiff,)	ORDER OF SERVICE;
)	DIRECTING DEFENDANTS TO
v.)	FILE DISPOSITIVE MOTION
)	OR NOTICE REGARDING
DOCTOR RICHARD MACK, et al.,)	SUCH MOTION
)	
Defendants.)	
)	

DISCUSSION

A federal court must conduct a preliminary screening in any case in which a prisoner seeks redress from a governmental entity or officer or employee of a governmental entity. *See* 28 U.S.C. § 1915A(a). In its review, the Court must identify any cognizable claims and dismiss any claims that are frivolous, malicious, fail to state a claim upon which relief may be granted or seek monetary relief from a defendant who is immune from such relief. *See* 28 U.S.C. § 1915A(b)(1), (2). *Pro se* pleadings must, however, be liberally construed. *See Balistreri v.*

1 *Pacifica Police Dep't.*, 901 F.2d 696, 699 (9th Cir. 1988).

2 To state a claim under 42 U.S.C. § 1983, a plaintiff must allege two essential elements:
3 (1) that a right secured by the Constitution or laws of the United States was violated, and (2) that
4 the alleged violation was committed by a person acting under the color of state law. *See West v.*
5 *Atkins*, 487 U.S. 42, 48 (1988).

6 B. Plaintiff's Claims

7 Plaintiff alleges that in May 2008, he suffered a knee injury. He asserts that he was in
8 constant pain, yet Defendants refused to prescribe him pain medication. On August 13, 2008, an
9 MRI revealed that Plaintiff had a completely torn anterior cruciate ligament, an incomplete
10 fracture through the medial proximal tibial metaphysis, and bone contusions within the medial
11 femoral condyle. The following month, Dr. Bowman noted that Plaintiff's knee was painful and
12 unstable, and recommended surgery. On November 4, 2008, Dr. Pompan also noted the ACL
13 tear and recommended surgery, observing that Plaintiff had chronic knee pain and was
14 debilitated. Finally, Plaintiff had surgery on February 4, 2009, and was prescribed vicodin for
15 the pain. Even after multiple requests and recommendations for pain medication by orthopedic
16 specialists, Plaintiff alleges that he did not receive any. He was promised morphine instead of
17 vicodin after his surgery, but never received it. Plaintiff states that although he did receive
18 tylenol and motrin, Defendants never made any real attempt to ease his pain. Liberally
19 construed, Plaintiff states a cognizable claim of deliberate indifference to serious medical needs.

20 C. Appointment of Counsel

21 Plaintiff's motion for appointment of counsel is DENIED for want of exceptional
22 circumstances. *See Rand v. Rowland*, 113 F.3d 1520, 1525 (9th Cir. 1997); *see also Lassiter v.*
23 *Dep't of Social Services*, 452 U.S. 18, 25 (1981) (there is no constitutional right to counsel in a
24 civil case). The issues in this case are not particularly complex, and Plaintiff has thus far been
25 able to adequately present his claims. This denial is without prejudice to the Court's *sua sponte*
26 appointment of counsel at a future date should the circumstances of this case warrant such
27 appointment.

CONCLUSION

For the foregoing reasons, the court hereby orders as follows:

1. Plaintiff's motion for appointment of counsel is DENIED.

2. The Clerk shall issue a summons and the United States Marshal shall serve, without prepayment of fees, copies of the complaint in this matter (docket no. 1), all attachments thereto, and copies of this order on **Doctor Richard Mack, Doctor Robert Bowman, Doctor R. Rodriguez, Doctor Donald Pompan, Doctor Sam Pajong-Do, LVN C. Sevier, LVN S. Remington, LVN Moses, and Doctor K. Kachare at Salinas Valley State Prison.** The Clerk shall also serve a copy of this order on Plaintiff and mail a courtesy copy of the complaint to the California Attorney General's Office.

3. No later than **ninety (90) days** from the date of this order, Defendants shall file a motion for summary judgment or other dispositive motion with respect to the cognizable claims in the complaint.

a. If Defendants elect to file a motion to dismiss on the grounds that Plaintiff failed to exhaust his available administrative remedies as required by 42 U.S.C. § 1997e(a), defendants shall do so in an unenumerated Rule 12(b) motion pursuant to *Wyatt v. Terhune*, 315 F.3d 1108, 1119-20 (9th Cir. 2003).

b. Any motion for summary judgment shall be supported by adequate factual documentation and shall conform in all respects to Rule 56 of the Federal Rules of Civil Procedure. **Defendants are advised that summary judgment cannot be granted, nor qualified immunity found, if material facts are in dispute. If Defendants are of the opinion that this case cannot be resolved by summary judgment, they shall so inform the court prior to the date the summary judgment motion is due.**

4. Plaintiff's opposition to the dispositive motion shall be filed with the Court and served on Defendants no later than **thirty (30) days** from the date Defendants' motion is filed.

a. In the event Defendants file an unenumerated motion to dismiss under

1 Rule 12(b), Plaintiff is hereby cautioned as follows:¹

2 The defendants have made a motion to dismiss pursuant to Rule 12(b) of
 3 the Federal Rules of Civil Procedure, on the ground you have not exhausted your
 4 administrative remedies. The motion will, if granted, result in the dismissal of
 5 your case. When a party you are suing makes a motion to dismiss for failure to
 6 exhaust, and that motion is properly supported by declarations (or other sworn
 7 testimony) and/or documents, you may not simply rely on what your complaint
 8 says. Instead, you must set out specific facts in declarations, depositions, answers
 9 to interrogatories, or documents, that contradict the facts shown in the defendant's
 10 declarations and documents and show that you have in fact exhausted your
 11 claims. If you do not submit your own evidence in opposition, the motion to
 12 dismiss, if appropriate, may be granted and the case dismissed.

13 b. In the event Defendants file a motion for summary judgment, the
 14 Ninth Circuit has held that the following notice should be given to plaintiffs:

15 The defendants have made a motion for summary judgment by which
 16 they seek to have your case dismissed. A motion for summary judgment under
 17 Rule 56 of the Federal Rules of Civil Procedure will, if granted, end your case.

18 Rule 56 tells you what you must do in order to oppose a motion for
 19 summary judgment. Generally, summary judgment must be granted when there is
 20 no genuine issue of material fact--that is, if there is no real dispute about any fact
 21 that would affect the result of your case, the party who asked for summary
 22 judgment is entitled to judgment as a matter of law, which will end your case.
 23 When a party you are suing makes a motion for summary judgment that is
 24 properly supported by declarations (or other sworn testimony), you cannot simply
 25 rely on what your complaint says. Instead, you must set out specific facts in
 26 declarations, depositions, answers to interrogatories, or authenticated documents,
 27 as provided in Rule 56(e), that contradict the facts shown in the defendants'
 28 declarations and documents and show that there is a genuine issue of material fact
 for trial. If you do not submit your own evidence in opposition, summary
 judgment, if appropriate, may be entered against you. If summary judgment is
 granted in favor of defendants, your case will be dismissed and there will be no
 trial.

29 See *Rand v. Rowland*, 154 F.3d 952, 963 (9th Cir. 1998) (en banc). Plaintiff is advised to read
 30 Rule 56 of the Federal Rules of Civil Procedure and *Celotex Corp. v. Catrett*, 477 U.S. 317
 31 (1986) (holding party opposing summary judgment must come forward with evidence showing
 32 triable issues of material fact on every essential element of his claim). Plaintiff is cautioned that
 33 failure to file an opposition to Defendants' motion for summary judgment may be deemed to be a
 34 consent by Plaintiff to the granting of the motion, and granting of judgment against Plaintiff

35 ¹ The following notice is adapted from the summary judgment notice to be given to pro se
 36 prisoners as set forth in *Rand v. Rowland*, 154 F.3d 952, 963 (9th Cir. 1998) (en banc). See
 37 *Wyatt v. Terhune*, 315 F.3d at 1120 n.14.

1 without a trial. *See Ghazali v. Moran*, 46 F.3d 52, 53-54 (9th Cir. 1995) (per curiam); *Brydges v.*
2 *Lewis*, 18 F.3d 651, 653 (9th Cir. 1994).

3 5. Defendants shall file a reply brief no later than **fifteen (15) days** after Plaintiff's
4 opposition is filed.

5 6. The motion shall be deemed submitted as of the date the reply brief is due. No
6 hearing will be held on the motion unless the court so orders at a later date.

7 7. All communications by the Plaintiff with the court must be served on Defendants,
8 or Defendants' counsel once counsel has been designated, by mailing a true copy of the
9 document to Defendants or Defendants' counsel.

10 8. Discovery may be taken in accordance with the Federal Rules of Civil Procedure.
11 No further court order is required before the parties may conduct discovery.

12 For Plaintiff's information, the proper manner of promulgating discovery is to send
13 demands for documents or interrogatories (questions asking for specific, factual responses)
14 directly to Defendants' counsel. *See* Fed. R. Civ. P. 33-34. The scope of discovery is limited to
15 matters "relevant to the claim or defense of any party . . ." *See* Fed. R. Civ. P. 26(b)(1).
16 Discovery may be further limited by court order if "(i) the discovery sought is unreasonably
17 cumulative or duplicative, or is obtainable from some other source that is more convenient, less
18 burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by
19 discovery in the action to obtain the information sought; or (iii) the burden or expense of the
20 proposed discovery outweighs its likely benefit." Fed. R. Civ. P. 26(b)(2). In order to comply
21 with the requirements of Rule 26, before deciding to promulgate discovery Plaintiff may find it
22 to his benefit to wait until Defendants have filed a dispositive motion which could include some
23 or all of the discovery Plaintiff might seek. In addition, no motion to compel will be considered
24 by the Court unless the meet-and-confer requirement of Rule 37(a)(2)(B) and N.D. Cal. Local
25 Rule 37-1 has been satisfied. Because Plaintiff is detained, he is not required to meet and confer
26 with Defendants in person. Rather, if his discovery requests are denied and he intends to seek a
27 motion to compel, he must send a letter to Defendants to that effect, offering them one last
28 opportunity to provide him with the sought-after information.

1 9. It is Plaintiff's responsibility to prosecute this case. Plaintiff must keep the Court
2 and all parties informed of any change of address and must comply with the Court's orders in a
3 timely fashion. Failure to do so may result in the dismissal of this action for failure to prosecute
4 pursuant to Federal Rule of Civil Procedure 41(b).

5 IT IS SO ORDERED.

6 DATED: 11/24/2010


LUCY H. KOH
United States District Judge